(1)

Supreme Court, U.S.
FILED

941244 JAN 20 1995

OFFICE OF THE CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1994

JOHN W. BEHRENS,
Petitioner,

VS.

ROBERT J. PELLETIER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

LENARD G. WEISS
Counsel of Record
CHRISTINE A. MURPHY
M. EDWARD ROSS
STEEFEL, LEVITT & WEISS
A Professional Corporation
One Embarcadero Center, 30th Fl.
San Francisco, California 94111
Telephone: (415) 788-0900
Counsel for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

54 pp

QUESTION PRESENTED

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court held that in civil rights actions against individual government officials, orders denying claims of qualified immunity on a defendant's motion to dismiss or motion for summary judgment are appealable final decisions under 28 U.S.C. § 1291. Since *Mitchell*, three Circuit Courts of Appeals have adopted — and three others have rejected — a rule that jurisdiction over an interlocutory immunity appeal exists only if the defendant has not previously appealed any immunity issue. Here, the Court of Appeals for the Ninth Circuit dismissed petitioner's appeal of a summary judgment order denying his qualified immunity claim solely because petitioner had previously appealed the denial of a motion to dismiss on immunity grounds. The case therefore presents the following question:

Whether the court of appeals lacks jurisdiction over a government official's interlocutory appeal of a summary judgment order denying a claim of qualified immunity solely because the official had previously appealed a denial of immunity at the motion to dismiss stage.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	6
A. Circuit Decisions Are In Conflict: Three Circuits Accept, And Three Refuse, Jurisdiction Over More than One Interlocutory Immunity Appeal	6
B. The One-Appeal Rule Enforced By Three Courts of Appeals Is Directly At Odds With *Mitchell v. Forsyth*	10
C. The One-Appeal Rule Is Inconsistent With Supreme Court Case Law On Qualified Immunity And On The Collateral Order Doctrine	12
CONCLUSION	16

TABLE OF AUTHORITIES

Cases

	Page
Abel v. Miller, 904 F.2d 394 (7th Cir. 1990)	8
Anderson v. Creighton, 483 U.S. 635 (1987)	7
Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986)	12
Chuman v. Wright, 960 F.2d 104 (9th Cir. 1992)	5
Digital Equipment v. Desktop Direct, Inc., ___ U.S. ___, 114 S.Ct. 1992 (1994)	13-15
English v. Dyke, 23 F.3d 1086 (6th Cir. 1994)	8
Forsyth v. Kleindienst ("Forsyth I"), 599 F.2d 1203 (3d Cir. 1979)	10
Forsyth v. Kleindienst ("Forsyth II"), 700 F.2d 104 (3d Cir. 1983)	11
Forsyth v. Kleindienst ("Forsyth III"), 729 F.2d 267 (3d Cir. 1984)	11
Fry v. Melaragno, 939 F.2d 832 (9th Cir. 1991)	8
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	6
Kaiter v. Town of Boxford, 836 F.2d 704 (1st Cir. 1988)	8, 9, 12
Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986)	8
Kulwicki v. Dawson, 969 F.2d 1454 (3d Cir. 1992)	8
Mitchell v. Forsyth, 472 U.S. 511 (1985)	2, 4, 6, 7-15
Murphy v. Morris, 849 F.2d 1101 (8th Cir. 1988)	8
Nelson v. Silverman, 999 F.2d 417 (9th Cir. 1993)	8, 13, 14
Nixon v. Fitzgerald, 457 U.S. 731 (1982)	2
Pelletier v. Federal Home Loan Bank of San Francisco, 968 F.2d 865 (9th Cir. 1992)	2, 3, 4, 9

TABLE OF AUTHORITIES

CASES

Page

Siegert v. Gilley, 500 U.S. 226 (1991) 5
Sinclair v. Schriber, 834 F.2d 103 (6th Cir. 1987) ... 8
United States v. MacDonald, 435 U.S. 850 (1978) ... 13-15

Statutes

28 U.S.C. § 1254(1) 2, 4, 10
28 U.S.C. § 1291 ..... 2, 5, 10-15
28 U.S.C. § 2071 9

In the Supreme Court

OF THE

United States

OCTOBER TERM 1994

JOHN W. BEHRENS,
Petitioner,

VS.

ROBERT J. PELLETIER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

John W. Behrens respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit dismissing for lack of jurisdiction petitioner's interlocutory appeal of the district court's order denying qualified immunity.

OPINIONS BELOW

The order of the court of appeals for which a writ of certiorari is sought (Appendix, *infra,* 1a) is unreported. A prior and related opinion of the court of appeals in this case (App. 10a-33a) is reported at 968 F.2d 865. The opinions of the district court (App. 2a and 8a) are unreported.

JURISDICTION

The court of appeals entered its order dismissing petitioner's appeal on November 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Certiorari jurisdiction under § 1254(1) includes jurisdiction to review an order of the court of appeals dismissing an interlocutory immunity appeal for lack of jurisdiction. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

STATUTORY PROVISION INVOLVED

Petitioner's appeal was dismissed on the ground that the court of appeals lacked jurisdiction under 28 U.S.C. § 1291, as construed in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Section 1291 states in pertinent part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

STATEMENT

In 1988 respondent Robert J. Pelletier brought a civil rights action for damages against, among others, the Federal Home Loan Bank of San Francisco and its employee, petitioner John Behrens. The factual history of the case is described in some detail in the Ninth Circuit's decision on Behrens' earlier immunity appeal, *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865 (9th Cir. 1992) (App. 10a-33a). Briefly, in the mid-1980's the Federal Home Loan Bank Board, the federal agency then responsible for regulating savings and loan associations, designated Behrens as the Bank Board's supervisory agent for certain thrifts. One of the thrifts placed under Behrens' supervision was Pioneer Savings, a federally insured institution. When the Bank Board approved Pioneer's application for insurance of its accounts in 1984, it imposed certain conditions on Pioneer, including the requirement that Pioneer hire a

managing officer subject to approval by the Bank Board. Pioneer provisionally named Pelletier managing officer in 1985, then sought Bank Board approval. As Pioneer's supervisory agent, Behrens notified Pioneer by letter dated May 8, 1986 that Pelletier's employment could not be approved at that time because Pelletier was under regulatory investigation in connection with the failure of another thrift. The ensuing lawsuit claimed that Behrens was responsible for Pelletier's being summarily fired by Pioneer, and for Pelletier's alleged inability thereafter to obtain other employment in the savings and loan industry. The causes of action against Behrens are pleaded as constitutional and common law torts.

Pelletier's constitutional tort claims against Behrens fall into two groups involving different factual predicates. One group is based on the May 1986 letter from Behrens to Pioneer which Pelletier contends resulted in termination of his employment; the other involves what the Ninth Circuit characterized as "nebulous theories of conspiracy" to prevent Pelletier from obtaining a similar position elsewhere. The district court dismissed the job-termination claims as time-barred. Behrens moved to dismiss the remaining constitutional tort claims, all premised on the vague conspiracy theories, on the ground that he was entitled to qualified immunity. When the district court denied the motion to dismiss, Behrens filed the interlocutory appeal that produced the 1992 *Pelletier* decision. App. 11a-16a.[1]

---

[1]In the same appeal Behrens also sought review of the district court's refusal to substitute the United States as defendant in place of Behrens on Pelletier's common law tort claims. Reversing the district court on that issue, the court of appeals ruled that substitution was mandatory under the Federal Employees Liability Reform and Tort Compensation Act because all of Behrens' alleged activities, including the May 1986 letter, were within the scope of his employment as a federal official. App. 32a.

On the initial appeal, the Ninth Circuit conceded that under *Mitchell v. Forsyth*, orders denying dismissal and orders denying summary judgment on qualified immunity claims are both appealable final orders. It nonetheless announced, for the first time, a rule designed to restrict substantially the scope of *Mitchell* appeal rights. A defendant who exercised his right to appeal an adverse dismissal decision did so "at his peril," said the panel, because the court of appeals would refuse to hear any subsequent appeal at the summary judgment stage. App. 17a-19a. As a result, Behrens' first pre-trial appeal, made the vehicle for a new "one immunity appeal" rule in the Ninth Circuit, abruptly became his last.

The court then reviewed the denial of Behrens' motion to dismiss the conspiracy-based claims on immunity grounds. It concluded that Pelletier's allegations were adequate for pleading purposes, but "would be insufficient to survive a motion for summary judgment" under the most relaxed evidentiary standard. App. 22a-23a. The effect of the new one-appeal rule, however, was to insulate a later summary judgment decision if the district court chose not to follow the Ninth Circuit's explicit guidance. Further, the panel volunteered in a footnote its belief that the district court had applied the wrong statute of limitations in dismissing the job-termination claims against Behrens. Although the dismissal of those claims had not been appealed, the court's *sua sponte* observation effectively revived and reinstated them. App. 15a, n.6. Thus, the job-termination claims — which were not included in the appeal before the court, and had never been the subject of an immunity determination — sprang back to life in appeal-proof form as a result of the newly created second-appeal bar. The panel suggested, how-

ever, that summary judgment should easily dispose of those claims as well.[2]

Litigation resumed, and after submitting to full discovery Behrens made the summary judgment motion the Ninth Circuit had indicated should resolve the immunity issues in his favor. In September 1994, without oral argument or opinion, the district judge denied Behrens' summary judgment motion as to all claims. App. 5a, 6a. Behrens filed a timely notice of appeal under 28 U.S.C. § 1291. On motion of respondent Pelletier the district court entered an order declaring the appeal frivolous (App. 8a), apparently on the theory that the prior *Pelletier* decision was the law of the case.[3] Pelletier also moved in the Ninth Circuit to dismiss Behrens' appeal for lack of jurisdiction, again citing the earlier appellate decision as dispositive. On November 17, 1994, a Ninth Circuit motions panel dismissed, solely on the ground that the appeal was a second one and the court of appeals therefore lacked jurisdiction under its single immunity appeal rule. App. 1a. In the same order, the court of appeals denied a stay pending application for writ of certiorari.[4]

---

[2]The court noted that the Ninth Circuit had never decided whether private employment contingent on regulatory approval (like Pelletier's job with Pioneer) involves any constitutionally protected interest. App. 21a. In short, the revived job-termination claims alleged no violation of "a clearly established constitutional right" — a ground for summary judgment on qualified immunity. *Siegert v. Gilley*, 500 U.S 226 (1991).

[3]Ninth Circuit case law permits the district court to certify in writing that an interlocutory immunity appeal is "frivolous or waived." The effect of such certification is to create dual jurisdiction in the trial and appellate courts, permitting the case to proceed toward trial while the appeal is pending unless the court of appeals issues its own affirmative stay. *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992).

[4]Behrens has filed concurrently with this petition an application for a stay of the trial now set to commence on May 16, 1994. All defendants

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because this case presents an important question of federal appellate jurisdiction which affects virtually all government employees, state and federal, who become defendants in civil rights actions. The issue has been addressed by six of the United States Circuit Courts of Appeals, with three holding that jurisdiction is limited to one interlocutory appeal on immunity issues, and three declaring that *Mitchell v. Forsyth* permits two such appeals. Conflicting rules are not tolerable in view of this Court's emphasis on the need for rapid, consistent immunity determinations to minimize disruption of governmental processes. Further, the single-appeal rule applied in this case by the Ninth Circuit cannot be reconciled with either the specific holding in *Mitchell v. Forsyth*, or the importance that recent decisions of this Court have clearly and consistently afforded the immunity defense.

A. Circuit Decisions Are In Conflict: Three Circuits Accept, And Three Refuse, Jurisdiction Over More Than One Interlocutory Immunity Appeal

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court concluded that untenable civil rights actions against government employees should be terminated as rapidly as possible in order to minimize the "costs of subjecting officials to the risks of trial — distraction of officials from their governmental duties, inhibition of discretionary actions, and deterrence of able people from public service." *Id.* at 816. To facilitate pre-trial resolution, the Court stripped the qualified immunity defense available to such defendants of the subjective elements that commonly required jury determination, and

---

have been dismissed except Behrens and the United States, which was substituted for Behrens as defendant on the common law tort claims. The stay application is addressed to Justice O'Connor, as Circuit Justice for the Ninth Circuit.

therefore a full trial of the case. The *Harlow* opinion stressed that since broad discovery and other pre-trial litigation burdens can be "peculiarly disruptive of effective government," a defendant who merited immunity was as much entitled to avoid those intrusions as he was entitled to protection from ultimate liability. *Id.* at 817-18 & n.29. Consistent with that strong policy statement, the Court decided three years later that an order denying qualified immunity is subject to immediate interlocutory appeal because the core of the defense, the right not to stand trial, is irretrievably lost if review is available only after a final verdict. Specifically, the *Mitchell* opinion held that "denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets [the finality] requirements" of the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. at 527. The decision also identified at least two legal issues which, if resolved against a civil rights defendant, provide proper grounds for pre-trial appeal:

> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. . . . Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

Id. at 526-27, citations omitted; *see also Anderson v. Creighton*, 483 U.S. 635, 641, 646 n.6 (1987).

Six Circuit Courts of Appeals have considered whether *Mitchell* means what it clearly appears to say: that a civil rights defendant may take an interlocutory appeal of a district court's denial of a motion to dismiss on the ground of immunity, *and*, if necessary, appeal a subsequent adverse

summary judgment decision before trial as well. Three of the appellate courts have answered affirmatively; three have said no. The court most recently stating a position is the Third Circuit: "[I]t is generally understood that *Mitchell* contemplates appeals from denials of immunity at either or both of these stages in civil rights proceedings." *Kulwicki v. Dawson*, 969 F.2d 1454, 1460 n.5 (3d Cir. 1992) (dictum); *accord, Murphy v. Morris*, 849 F.2d 1101, 1103-04 (8th Cir. 1988) (rejecting appeal limit on the ground that it undercuts the value of the immunity defense); *English v. Dyke*, 23 F.3d 1086, 1089 (6th Cir. 1994) (first appeal does not preclude second); *Sinclair v. Schriber*, 834 F.2d 103, 104-05 (6th Cir. 1987) (subject to collateral order requirements, *Bivens* defendant has "two bites out of the appellate apple, at the pleading and at the discovery stage"); *Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986) (there may be "not one but two interlocutory appeals" on immunity defense in civil rights action).

The Ninth, First and Seventh Circuits, on the other hand, assert that while *Mitchell v. Forsyth* offers "several *opportunities* for immediate appeal," a defendant may use only one of those opportunities. *Pelletier v. FHLBSF, supra*, 968 F.2d at 870-71 (emphasis in original); *Nelson v. Silverman*, 999 F.2d 417 (9th Cir. 1993) (rule is absolute and categorical, "applicable to all second appeals"); *Abel v. Miller*, 904 F.2d 394, 395-96 (7th Cir. 1990) ("*Mitchell* does not contemplate sequential appeals"); *Kaiter v. Town of Boxford*, 836 F.2d 704, 707-08 (1st Cir. 1988) ("both motions should be resolved prior to any interlocutory appeal").[5]

Resolution of the issue by this Court is essential. Whether a governmental official defending a civil rights suit is enti-

---

[5]Before it reversed directions in *Pelletier*, the Ninth Circuit had indicated that it would adopt the two-appeal theory. *Fry v. Melaragno*, 939 F.2d 832, 835 n.5 (9th Cir. 1991).

tled to one pre-trial immunity appeal or two significantly affects the utility of the immunity defense, and therefore the policy objectives the defense rests upon. A one-appeal rule effectively halves the reach of the immunity umbrella. As a practical matter, it compels a defendant to accept an erroneous denial of his motion to dismiss at the pleading stage, to submit to unwarranted discovery and bear the unwarranted interference of protracted litigation, in order to insure appellate access if the district court repeats its error at the summary judgment stage. Indeed, the First Circuit candidly acknowledges that a single appeal rule is a judicially compelled waiver of appellate rights:

> [I]f [a defendant whose motion to dismiss on the ground of immunity has been denied] wishes to take an immediate interlocutory appeal, [he must] state unequivocally — as a condition thereto — that he waives any right to file additional *interlocutory* appeals from any subsequent prejudgment rulings relative to immunity, absolute or qualified.

Kaiter v. Town of Boxford, 836 F.2d at 708 (emphasis in original).[6]

The effectiveness of the federal qualified immunity defense should not and cannot depend on whether a government official is sued in Los Angeles or in Philadelphia. Petitioner Behrens respectfully contends that in view of the division in circuit-level case law on this substantial jurisdictional issue, certiorari should be granted.

---

[6]Framed in those bald terms, the one-appeal limitation strongly resembles a court-fashioned rule of appellate procedure imposed without the process prescribed by 28 U.S.C. § 2071. The Ninth Circuit achieves the same forced waiver effect by daring a defendant to "appeal[ ] at his peril" in the earlier stages of the litigation. *Pelletier v. FHLBSF*, 968 F.2d at 871.

B. The One-Appeal Rule Enforced By Three Courts of Appeals Is Directly At Odds With *Mitchell v. Forsyth*

The Ninth Circuit dismissed petitioner Behrens' appeal on the ground that the court of appeals lacks jurisdiction over all second immunity appeals. *Nelson v. Silverman*, 999 F.2d at 419. That position cannot be reconciled with this Court's decision in *Mitchell v. Forsyth*. *Mitchell* itself involved a second pre-trial immunity appeal, which the Third Circuit heard as an interlocutory appeal under § 1291. This Court, whose certiorari jurisdiction over the case under 28 U.S.C. § 1254(1) was contingent upon the existence of proper appellate jurisdiction below, heard and decided the case without jurisdictional misgivings.

The *Mitchell* case had its origin in a civil rights suit against former Attorney General John Mitchell and others, alleging illegal use of wiretaps. Mitchell moved for summary judgment on defenses of both absolute and qualified immunity. The district court ruled that as a matter of law Mitchell was not entitled to absolute immunity, and denied summary judgment on the qualified immunity claim based on a finding of disputed facts. Mitchell appealed. *Forsyth v. Kleindienst ("Forsyth I")*, 599 F.2d 1203, 1205-06 (3d Cir. 1979); see *Mitchell v. Forsyth*, 472 U.S. at 516. The Third Circuit dismissed the appeal as to qualified immunity on the ground that it was not an appealable order, but decided the absolute immunity issue. Concluding that the factual record was incomplete, the court of appeals outlined the proper absolute immunity test and remanded to the district court. *Forsyth I*, 599 F.2d at 1217. That was the first Mitchell appeal.

In the trial court once more, Mitchell filed another summary judgment motion, again asserting absolute and qualified immunity. The district court denied the motion on both issues and granted Forsyth's cross-motion for summary judgment on liability, leaving punitive damages issues to be

tried. *Mitchell v. Forsyth*, 472 U.S. at 516-17. Mitchell "*again appealed*, contending that the District Court had erred in its rulings on both absolute immunity and qualified immunity." *Id.* at 517 (emphasis added).

The second interlocutory appeal was referred initially to a Third Circuit motions panel for resolution of jurisdictional and stay issues. *Forsyth v. Kleindienst ("Forsyth II")*, 700 F.2d 104 (3d Cir. 1983). Although the panel majority found jurisdiction under § 1291, Judge Sloviter recorded a strong dissent based primarily on the posture of the appeal as a second one: "I find no precedent in *Forsyth I* for grant of interlocutory review to Mitchell *a second time* under the collateral order doctrine." *Forsyth II*, 700 F.2d at 107, 109 (emphasis added). The Third Circuit panel which subsequently issued an opinion on the merits also noted expressly that it was a "second interlocutory appeal from a denial of both absolute and qualified immunity." *Forsyth v. Kleindienst ("Forsyth III")*, 729 F.2d 267, 268 (3d Cir. 1984). The *Forsyth III* decision then went to this Court on writ of certiorari under the name *Mitchell v. Forsyth*. *Mitchell*, 472 U.S. at 518-19.

This Court was aware that in *Mitchell* it was reviewing a second interlocutory appeal, specifically calling attention to Judge Sloviter's argument that the appeal was "frivolous in light of the Third Circuit's earlier consideration of the same issue." *Id.* at 517, 518 n.3. In sum, the second-appeal issue was recognized by and squarely before the Supreme Court in *Mitchell*. Had it presented a jurisdictional impediment, this Court would have been obliged to note defective jurisdiction in the court of appeals:

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. . . . "And if the record discloses that the lower court was without

> jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit."

Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986) (brackets in original, citations omitted). The Court was untroubled about its jurisdiction over Mitchell's second immunity appeal, and made no suggestion, in its analysis of pre-trial appealability, that prior appellate access was or should be a limiting consideration on the issue of jurisdiction.[7]

Petitioner Behrens respectfully contends that certiorari should be granted because the *Mitchell* decision itself refutes the Ninth Circuit's determination that no jurisdiction exists under § 1291 to hear any second immunity appeal.

C. The One-Appeal Rule Is Inconsistent With Supreme Court Case Law On Qualified Immunity And On The Collateral Order Doctrine

The 1988 First Circuit decision that originated the one-appeal rule acknowledged that "*Mitchell*, read literally, permits two interlocutory appeals on immunity." *Kaiter v. Town of Boxford*, 836 F.2d at 707. However, the First Circuit and the two other benches that have followed its

---

[7]The fact that the appeal actually heard twice by the Third Circuit was an absolute immunity appeal is not a viable distinction. Both absolute and qualified immunity share the same policy rationale, and both are intended to shield against trial and litigation burdens as well as liability. *Mitchell*, 472 U.S. at 525-26. The point of *Mitchell* was that identical appeal rules apply to both. *Id.* at 526-27; see *Kaiter v. Town of Boxford*, 836 F.2d at 707 (absolute and qualified immunity are not only subject to the same appeal rules, but must both be raised in the same single appeal).

lead have taken the position that notwithstanding the literal words of *Mitchell*, a single-appeal limitation is justified by the judicial economies it achieves. The rationale for limiting immunity claimants to a single pre-trial appeal, as succinctly stated by the Ninth Circuit, is a straightforward cost-benefit analysis that offers only the briefest nod to the importance of the immunity right being circumscribed:

> [T]hese appeals ... exact a price. The price consists principally of the additional expense and delay imposed on a civil rights plaintiff before his case can come to trial. In addition, such appeals interfere with the orderly progress of litigation through the trial courts and limit the ability of district judges to manage their own dockets.... [T]he price is worth paying once but not repeatedly.

Nelson v. Silverman, 999 F.2d at 418; *see Kaiter v. Town of Boxford*, 836 F.2d at 707 (purpose of limitation is to avoid "burden[ing] the appellate system and prolong[ing] the pretrial process").

Based on that analysis, the single-appeal circuits decline jurisdiction over all second interlocutory appeals, as a class. *E.g., Nelson v. Silverman*, 999 F.2d at 419. A few months ago this Court confirmed in *Digital Equipment v. Desktop Direct, Inc.*, ____ U.S. ____, 114 S.Ct. 1992 (1994), that finality determinations indeed should be based on types or categories of claims, not particular facts. *Id.* at 1996 ("appealability under § 1291 is to be determined for the entire category to which a claim belongs"); see also *United States v. MacDonald*, 435 U.S. 850, 857 n.6 (1978) (Congress intended the concept of finality in § 1291 to be "defined in terms of categories"). In the immunity context, this Court has expressly defined the class of decisions that are final for purposes of appellate jurisdiction under § 1291: "denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity." *Mitchell v. Forsyth*, 472

U.S. at 527. The Ninth Circuit, however, reshuffles summary judgment appeals, if they follow a prior dismissal appeal, into a separate category solely on the basis of perceived "additional expense and delay [to] the plaintiff and inconvenience [to] the trial court." *Nelson v. Silverman*, 999 F.2d at 419. That process flouts not only the *Mitchell* holding but the principle recently underscored in *Digital Equipment* that jurisdictional categories depend on the right at stake, not on expense or housekeeping considerations.

The appellant in *Digital Equipment*, a defendant in the underlying lawsuit, sought interlocutory review of an order denying a motion to dismiss the suit. The issue in the case was whether the *Mitchell* holding that interlocutory appeal rights are necessary to preserve the "right not to stand trial" inherent in qualified immunity extends to a contractual trial exemption derived from a settlement agreement. Appellant argued that an order denying enforcement of a contract-based exemption from trial is indistinguishable, in its effect on litigants and the litigation process, from denial of a constitutional or policy-based exemption such as qualified immunity. Therefore, appellant reasoned, an order refusing to enforce a dismissal provision in a contract must also be treated as final for purposes of appellate jurisdiction.

This Court rejected the analogy precisely because the *jurisdictional category* delineated in *Mitchell* was qualified immunity appeals, not appeals from orders that wrongfully refuse to terminate litigation before trial. *Id.* at 1997-2000. The Court explained that "availability of collateral order appeal must be determined at a higher level of generality" than merely the effect the presence or absence of an appeal right has on the litigation process. *Id.* at 2000-01. The appealability of qualified immunity claims rests on immunity's "good pedigree in public law" and its foundation in public policy rather than efficient litigation management or

judicial economy. *Id.* at 2000. In contrast, trial immunities arising from private contractual agreements lack that pedigree. They do not as a category rise to the level of importance needed for recognition under § 1291, regardless of the effects they may share with the qualified immunity defense. *Id.* at 2001. "The substance of the rights entailed . . . is dispositive." *Id.* at 2001 (internal quotation marks omitted); see also *U.S. v. MacDonald, supra*, 435 U.S. at 860 n.7.

By emphasizing that jurisdictional categories are properly determined at the level of the right involved, not the level of courtroom impact, the *Digital Equipment* opinion confirms that *Mitchell* indeed meant what it said: denial of immunity is immediately appealable at the motion to dismiss stage *and again* at the summary judgment stage because immunity rights *as a class* are discrete enough, and jurisprudentially important enough, to merit the protection of interlocutory appellate review.

In sum, the substance of the right entailed in petitioner Behrens' appeal of an erroneous summary judgment order — his entitlement to qualified immunity — is not altered simply because he previously appealed an order denying dismissal. To the extent plaintiffs' costs and court calendars are pertinent to appealability at all, the Ninth Circuit's analysis inappropriately reweighs policy factors the Supreme Court has already considered and ranked below qualified immunity. The effect of the single immunity appeal rule is to subordinate the immunity entitlement to perceived cost and docket control considerations, thus restriking the policy balance achieved by this Court at a significantly lower level than Supreme Court case law indicates is appropriate for qualified immunity claims.

CONCLUSION

Petitioner respectfully requests that certiorari be granted to resolve the split in the decisions of the courts of appeals on this jurisdictional issue by disapproving the Ninth Circuit's rule limiting civil rights defendants to a single interlocutory immunity appeal.

Date: January 19, 1995

Respectfully submitted,

LENARD G. WEISS
Counsel of Record
STEEFEL, LEVITT & WEISS
A Professional Corporation
Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER,
Plaintiff-Appellee,

vs.

FEDERAL HOME LOAN BANK OF
San Francisco, *et al.*,
Defendants,
JOHN W. BEHRENS,
Defendant-Appellant.

No. 94-56507
DC# CV-89-969-RMT
Central California

ORDER

FILED
November 17, 1994
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: WALLACE, Chief Judge, GOODWIN and NORRIS, Circuit Judges

The motion to dismiss this appeal for lack of jurisdiction is granted. See *Nelson v. Silverman*, 999 F.2d 417, 418-19 (9th Cir. 1993). The motion to stay trial proceedings pending this court's disposition of the motion to dismiss is denied as moot. The motion to stay trial pending the filing of a petition for certiorari to the United States Supreme Court is denied. The request for sanctions is denied.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER,
Plaintiff,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,
Defendants.

No. CV 89-0969-RMT(Tx)

ORDER RE MOTIONS TO EXTEND DISCOVERY CUTOFF, MODIFY, RECONSIDER, AND STRIKE, AND FOR SUMMARY JUDGMENT AND CLARIFICATION

FILED
September 6, 1994
Clerk, U.S. District Court
Central District of California

ENTERED
September 7, 1994
Clerk, U.S. District Court
Central District of California

This matter has come before the court on the following motions:

1. Motion by plaintiff to modify this court's order of October 6, 1989[1] to the extent it dismissed the *Bivens* claims as against defendants John W. Behrens ("Behrens") and the Federal Home Loan Bank of San Francisco ("FHLB-SF");

---

[1]The motion refers to the order of October 6, 1991. However, the correct date of filing of the order is October 6, 1989.

2. Motion by defendant Office of Thrift Supervision ("OTS") for reconsideration and vacation of this court's order of August 10, 1990, which substituted OTS for FHLB-SF;

3. Motion by defendant OTS to strike jury demand;

4. Motion by defendant OTS to strike plaintiff's demand for punitive damages;

5. Motion by defendant Behrens for summary judgment;

6. Motion by defendant OTS for summary judgment;

7. Motion by Federal Deposit Insurance Corporation ("FDIC") for judgment on the pleadings as to plaintiff's claims for violation of the Privacy Act and interference with contractual relations and inducing breach of contract, which claims were severed from CV 86-6780-RMT and CV 88-651-RMT and consolidated herein; and

8. Motion by FDIC and defendants OTS, Behrens and the United States of America for leave to take depositions and for clarification of this court's order of March 3, 1994.

The court having considered the pleadings and other documents filed herein has determined as follows:

1. Plaintiff's *Bivens* claims should be reinstated as against defendant Behrens, since the applicable statute of limitations is three, rather than one, year;

2. Plaintiff's *Bivens* claims should not be reinstated as against defendant FHLB-SF, since said defendant is not a government actor and, therefore, is not liable under a *Bivens* claim;

3. As to the *Bivens* and Administrative Procedure Act claims, the action challenged by plaintiff is the letter written by defendant Behrens suggesting that plaintiff "step aside from the management" of Pioneer Savings and recommending that the board of directors "initiate a search for a

new managing officer without delay." Since defendant Behrens did not have the authority to issue said letter, and because the Federal Home Loan Bank Board ("FHLBB") *cannot* "be held liable for the exercise of 'authority' it never delegated or authorized in any way," (*Saratoga S & L v. Federal Home Loan Bank*, 724 F.Supp. 683 (N.D.Cal. 1989)), issuance of the letter by defendant Behrens should not be considered "agency action," as that term is used in the Administrative Procedure Act. As such, summary judgment should be granted in favor of all defendants on the third claim for relief for violation of the Administrative Procedure Act.

4. Defendant Behrens' authority to monitor conditions imposed by the FHLBB derived exclusively from the regulatory authority of the FHLBB. Although the FHLB-SF was the employer of defendant Behrens, the bank was not charged with any examination or oversight of the federally insured banks in its district. The issuance of the letter by defendant Behrens was not a function " 'that may fairly be regarded as typical of or broadly incidental' to the enterprise undertaken by the [FHLB-SF].' " *Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865, 876 (9th Cir. 1992), *quoting Perez v. Van Groningen & Sons, Inc.*, 41 Cal.3d 963, 968 (1986), *quoting Rodgers v. Kemper Constr. Co.*, 50 Cal.App.3d 608, 619 (1975). As such, the FHLB-SF should not be vicariously liable for the issuance of the letter by defendant Behrens. Consequently, summary judgment should be granted in favor of defendant FHLB-SF, or OTS as substituted for FHLB-SF, on the fifth claim for interference with contractual relations and inducing breach of contract, the sixth claim for intentional infliction of emotional distress, the seventh claim for negligent infliction of emotional distress and the eighth claim for negligence;

5. This court's order of August 10, 1990, which substituted OTS for FHLB-SF was incorrect and should be

vacated. However, OTS as substituted for FHLB-SF or FHLB-SF is entitled to summary judgment on the third, fifth, sixth, seventh and eighth claims for relief;

6. Material issues of fact remain as to defendant Behrens on the *Bivens* claims.

7. Plaintiff does not oppose the motion by FDIC to the extent it seeks judgment on the claim for interference with contractual relations and inducing breach of contract;

8. The motion by FDIC for judgment as to the claim for violation of the Privacy Act should be, and is hereby, deemed to be a motion for summary judgment. For the same reasons this court granted summary judgment on the Privacy Act claim in favor of defendant United States of America and OTS by order filed January 30, 1992, and entered January 31, 1992, summary judgment should have also been granted in favor of FDIC;

9. Although defendants have already had adequate opportunity to complete depositions as to plaintiff's fact witnesses, defendants should be provided with the opportunity to depose plaintiff's expert witnesses; and

10. Because plaintiff's claim for negligent infliction of emotional distress is subsumed under his claim for negligence, the seventh claim for negligent infliction of emotional distress should be dismissed.

Accordingly,

IT IS ORDERED as follows:

1. This court's order of October 6, 1989, to the extent it dismissed the *Bivens* claims as against defendant Behrens, is vacated and said claims as against defendant Behrens are hereby reinstated; the motion to the extent it seeks reinstatement of the Bivens claims as against defendant FHLB-SF is denied.

2. Summary judgment is granted in favor of all defendants on plaintiff's third claim for violation of the Administrative Procedure Act.

3. Summary judgment is granted in favor of FHLB-SF or OTS as substituted for FHLB-SF on plaintiff's fifth claim for interference with contractual relations and inducing breach of contract, sixth claim for intentional infliction of emotional distress, seventh claim for negligent infliction of emotional distress and eighth claim for negligence.

4. Motion by defendant OTS for reconsideration and vacation of this court's order of August 10, 1990, which substituted OTS for FHLB-SF is granted.

5. Judgment in favor of FDIC is granted as to plaintiff's claim for interference with contractual relations and inducing breach of contract.

6. This court's findings of fact and conclusions of law and order granting in part motions for summary judgment by defendants United States of America and Office of Thrift Supervision filed January 30, 1992, and entered January 31, 1992, are hereby amended to include FDIC, such that summary judgment is granted in favor of FDIC on plaintiff's claim for violation of the Privacy Act on the same basis that such summary judgment was granted in favor of defendants United States of America and OTS.

7. Motion by defendants for leave to depose fact witnesses is denied; motion by defendants for leave to depose plaintiff's expert witnesses is granted. Plaintiff shall make the expert witnesses he intends to call at trial available for deposition by defendants.

8. Motion by defendant Behrens for summary judgment is denied as to the Bivens claims.

9. Motions by defendant OTS to strike jury demand and to strike plaintiff's demand for punitive damages are denied as moot.

10. Plaintiff's claim for negligent infliction of emotional distress is dismissed without prejudice.

11. Counsel are advised that the claims remaining are as follows: The first and second claims under Bivens as against defendant Behrens and the eighth claim for negligence under the General Tort Claims Act as against defendant United States of America.[2]

Dated: September 6, 1994

/s/ ROBERT M. TAKASUGI
ROBERT M. TAKASUGI
United States District Judge

---

[2]The fifth claim for interference with contractual relations and inducing breach of contract against defendant Behrens, as to whom the United States of America has been substituted, is eliminated on the basis that the motion by the United States of America to dismiss said claim was granted by the order of October 6, 1989, on the grounds that such claims are excluded under the Federal Torts Claims Act. The sixth claim for intentional infliction of emotional distress against defendant Behrens, as to whom the United States of America has been substituted, is eliminated on the basis that the motion by the United States of America for summary judgment on said claim was granted by the order filed January 30, 1992, and entered January 31, 1992.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER,
Plaintiff,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,
Defendants.

NO. CV 89-0969-RMT (TX)

ORDER CERTIFYING APPEAL AS FRIVOLOUS

FILED
November 7, 1994
Clerk, U.S. District Court
Central District of California

ENTERED
November 9, 1994
Clerk, U.S. District Court
Central District of California

This matter has come before the court on the following: (1) *Ex parte* application by defendant John W. Behrens (filed by Behrens' appellate attorneys) filed November 1, 1994, for order vacating order entered October 27, 1994; (2) *Ex parte* application by plaintiff for order striking both the purported notice of appeal and the *ex parte* application filed November 1, 1994 by Behrens' appellate attorneys; and (3) *Ex parte* application by defendant United States of America for clarification of the October 27, 1994, order. Having considered the pleadings and other documents filed herein, the court has determined the following:

1. Behrens contends that his appeal of this court's denial of qualified immunity by denying his motion for summary judgment is not frivolous even in light of the "one appeal"

rule as pronounced in *Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865 (9th Cir. 1992), because said rule should not be applied to him retroactively. However, in *Pelletier*, it is clear that the Court already applied the "one appeal" rule retroactively to Behrens: The Court stated that [w]ith respect to the qualified immunity issue, because Behrens has not previously appealed any denial of qualified immunity, we have jurisdiction to consider his appeal." *Id.* at 867.

2. In light of the "one appeal" rule, Behrens currently pending appeal is frivolous and waived.

Accordingly,

IT IS ORDERED as follows:

1. The *ex parte* application by defendant Behrens for order vacating order entered October 27, 1994, is denied.

2. The interlocutory appeal of defendant Behrens to this court's September 7, 1994, order is certified as frivolous and waived by his prior interlocutory appeal in this action.

Dated: November 7, 1994

/s/ ROBERT M. TAKASUGI
ROBERT M. TAKASUGI
United States District Judge

ROBERT J. PELLETIER,
Plaintiff-Appellee,
v.
FEDERAL HOME LOAN BANK
OF SAN FRANCISCO, et al.,
Defendants,
and
JOHN W. BEHRENS,
Defendant-Appellant.

Nos. 89-56265, 92-55023.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Argued and Submitted April 4, 1991.
Submission Vacated July 24, 1991.
Resubmitted Feb. 19, 1992.
Decided June 29, 1992.

Richard A. Olderman, U.S. Dept. of Justice, Washington, D.C., for defendant-appellant.

Samuel T. Rees, Knapp, Petersen & Clarke, Glendale, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before: SCHROEDER and REINHARDT, Circuit Judges, and KING, Senior District Judge.*

REINHARDT, Circuit Judge:

Appellee Robert J. Pelletier brought this lawsuit to challenge certain regulatory actions that resulted in his dismissal as managing officer of Pioneer Savings and Loan Association and his subsequent inability to find comparable employ-

*Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

ment in the savings and loan industry. As to defendant Behrens, Pelletier alleged both *Bivens*[1] and common law tort claims. Behrens now appeals the district court's denials of his motion to dismiss the *Bivens* claims based on qualified immunity and his motion to substitute the United States in his place as to the common law tort claims, pursuant to the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA). We affirm in part and reverse in part. With respect to the qualified immunity issue, because Behrens has not previously appealed any denial of qualified immunity, we have jurisdiction to consider his appeal. We hold that Pelletier's allegations were sufficient to survive a motion to dismiss. With respect to the substitution issue, however, we conclude that the district court improperly applied a narrow "scope of authority" test rather than the broader "scope of employment" test required by the FELRTCA. Under the broader rule, we hold that as a matter of law Behrens was acting within the scope of his employment when he took the actions complained of by Pelletier. Accordingly, Behrens is entitled to substitution.

I

This case arises out of the early years of the savings and loan crisis. On March 29, 1984, the Federal Home Loan Bank Board (FHLBB) formally approved a *de novo* application for insurance of accounts made by South Coast Savings and Loan Association (South Coast). The FHLBB imposed a number of requirements on South Coast as conditions of regulatory approval. In particular, the FHLBB directed South Coast to "provide for the employment of a qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent." Resolution

---

[1] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

No. 84-164, ¶ 10(p) (March 29, 1984).[2] In early 1985, South Coast was succeeded in interest by Pioneer Savings and Loan Association (Pioneer). On March 18, 1985, Pioneer named appellee Robert J. Pelletier as its managing officer and, pursuant to Resolution No. 84-164, requested approval from the FHLBB.

Prior to accepting the position at Pioneer, Pelletier had served as Senior Vice President in charge of the Major Loan Division of the Beverly Hills Savings and Loan Association (BHSL).[3] In that capacity, Pelletier also sat on BHSL's Senior Loan Committee, which was responsible for evaluating and approving loans that exceeded dollar limits or fell outside of other criteria established by BHSL's Board of Directors. On April 23, 1985, shortly after Pioneer had requested FHLBB approval of Pelletier as its managing officer, the FHLBB declared BHSL insolvent and placed the institution in receivership. A continuing investigation by the Federal Savings and Loan Insurance Corporation (FSLIC) into the failure of BHSL raised questions regard-

---

[2]The full text of the requirement reads:

[T]he institution shall provide for employment of a qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent, on a salaried basis who shall be charged with full administrative and managerial responsibilities of the institution under policies established by its board of directors. In the event of the managing officer's removal, incapacity or resignation during the period between the commencement of operations and the beginning of the first full fiscal year and for the three years following the beginning of the first full fiscal year, the continuation or succession of competent management will also be subject to the Principal Supervisory Agent's approval.

Resolution No. 84-164, ¶ 10(p) (March 29, 1984).

[3]Pelletier resigned his position at BHSL in March, 1984, because he did not wish to relocate when BHSL moved to new offices. From mid-1984 to early 1985, Pelletier served as managing officer of Equitable Savings and Loan Association of Orange County. Again, he resigned rather than relocate his home. Shortly thereafter, he accepted Pioneer's offer of employment.

ing the conduct of a number of BHSL's senior officers, including Pelletier.

Appellant John W. Behrens, a Supervisory Agent of the FHLBB, took over the South Coast/Pioneer file from another Supervisory Agent in or about April, 1986.[4] On May 8, 1986, in a confidential letter on FHLBB letterhead, Behrens informed Pioneer that the FHLBB would be unable to proceed with the application for approval of Pelletier as Pioneer's managing officer until the investigation of BHSL was complete. The letter read as follows:

> This is in response to the application by Pioneer Savings, requesting approval for Mr. Robert Pelletier to become managing officer of the association. We wish to advise you that an inquiry is currently being conducted by the Federal Savings and Loan Insurance Corporation (FSLIC) into the failure of Beverly Hills Savings and Loan Association, and because of Mr. Pelletier's previous employment with that institution this office is unable at this time to proceed with the application until that inquiry is complete. In this regard, we believe it would be appropriate if Mr. Pelletier would step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills savings is complete.
>
> In view of the foregoing, we believe it is imperative that the Board of Directors initiate a search for a new managing officer without delay. We ask that you keep this office advised as to your progress in this regard.

---

[4]Behrens is a salaried employee of the Federal Home Loan Bank of San Francisco. On March 17, 1984, the FHLBB adopted Formal Resolution 84-126, which designated Behrens a Supervisory Agent of the FHLBB and FSLIC for the Eleventh District. In that capacity, Behrens became responsible for monitoring the operations of a number of federally insured savings and loan associations to ensure regulatory compliance. 12 C.F.R. § 501.11 (1989).

Upon receipt of the letter from Behrens, Pioneer requested Pelletier's resignation. When Pelletier refused to resign, Pioneer fired him. Despite numerous attempts, Pelletier subsequently has been unable to obtain comparable employment in the savings and loan industry. Pelletier alleges that several positions were tentatively offered to him, but that those offers were all withdrawn when the prospective employers learned of the circumstances surrounding Pelletier's departure from Pioneer.

In February, 1989, Pelletier filed suit against Behrens, the Federal Home Loan Bank of San Francisco, the FHLBB, and the United States, asserting that the decision to direct Pioneer to terminate Pelletier was made summarily and without process, and that since Pelletier's dismissal from Pioneer the defendants had made a concerted and successful effort to prevent Pelletier from securing employment in the financial services industry. Pelletier alleged that this conduct on the part of the defendants violated his fifth amendment right to procedural due process and deprived him of his constitutionally protected liberty interest in employment within the financial services industry. In addition, Pelletier alleged common law tort claims for interference with contractual rights, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence.[5]

Behrens filed a motion to dismiss, or in the alternative for summary judgment. He contended that Pelletier's constitutional tort claims were barred by the statute of limitations and that, in any event, judicial creation of a *Bivens* remedy was preempted by the extensive federal regulation of the savings and loan industry. In the alternative, Behrens argued that he was entitled to qualified immunity from liability for

---

[5]Pelletier also sought damages and injunctive relief for alleged violations of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and the Privacy Act, 5 U.S.C. § 552a.

the actions described. As to Pelletier's common law tort claims, Behrens argued that the United States should be substituted in his place as defendant, pursuant to the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA), Pub.L. No. 100-694, 102 Stat. 4563 (1988) (amending Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680). As required by the FELRTCA, Behrens submitted a scope of employment certification prepared by the Attorney General. 28 U.S.C. § 2679(d)(1).

The district court agreed that to the extent Pelletier sought relief for the loss of his job at Pioneer in 1986, his constitutional tort claims, as well as his claims for infliction of emotional distress, were barred by the statute of limitations.[6] However, the court denied Behrens's motion to dismiss Pelletier's constitutional claims as time-barred to the extent that Pelletier alleged continuing efforts to prevent him from securing employment in the savings and loan industry. Similarly, the court denied Behrens's motion to dismiss Pelletier's common law claims for infliction of emotional distress to the extent that those claims alleged continuing torts. The court also denied Behrens's motion to dismiss Pelletier's claims for intentional interference with contractual rights and negligence. The court declined to rule on Behrens's motion for summary judgment, on the ground that it would be premature to do so before discovery had been conducted.

---

[6]The district court found that the statute of limitations for a *Bivens* claim originating in California is one year. The court's finding appears contrary to the rule established by our holding in *Marshall v. Kleppe*, 637 F.2d 1217, 1223-24 (9th Cir.1980); *see Van Strum v. Lawn*, 940 F.2d 406 (9th Cir.1991) (holding that the statute of limitations applicable to *Bivens* claims is the state statute of limitations for personal injury, but declining to give that holding retroactive effect). However, the parties do not contest this part of the district court's order in this limited interlocutory appeal.

Behrens timely appealed the district court's partial denial of his motion to dismiss Pelletier's constitutional and common law tort claims.[7] However, because it was unclear from the district court's order whether or not the court had ruled on Behrens's request for substitution of the United States as defendant with respect to Pelletier's common law tort claims, we vacated submission of the case and remanded to allow the district court to address the substitution issue. On limited remand, the district court denied Behrens's motion for substitution on the ground that removal of Pelletier from his position as managing officer was not within the scope of Behrens's authority as defined in 12 C.F.R. § 501.11 (1989), *repealed by* 54 Fed.Reg. 49,420 (1989). Behrens filed a separate appeal from that order. The appeals were consolidated by order of this court.

II

Behrens argues that the comprehensive federal regulation of the savings and loan industry precludes judicial creation of a *Bivens* remedy in this case. In the alternative, he argues that the allegations that form the basis of Pelletier's *Bivens* claims are as a matter of law insufficient to survive a motion to dismiss on the ground of qualified immunity. In response, Pelletier contends that the denial of a motion to dismiss is not an appealable interlocutory order. Because Pelletier's argument concerns our jurisdiction to hear this appeal, we address it first. We conclude that the denial of a motion to dismiss on the ground of qualified immunity is immediately appealable, but that Pelletier has alleged sufficient facts to survive such a motion.

---

[7]Behrens does not contest the district court's disposition of his motion to dismiss with respect to Pelletier's APA and Privacy Act claims.

A

[1] We are satisfied that a denial of qualified immunity is an appealable "final" order under the test set forth in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), regardless of whether that denial takes the form of a refusal to grant a defendant's motion to dismiss or a denial of summary judgment. *Fry v. Melaragno*, 939 F.2d 832, 835 (9th Cir.1991); *see also Mitchell v. Forsyth*, 472 U.S. 511, 527, 105 S.Ct. 2806, 2816, 86 L.Ed.2d 411 (1985) ("The denial of a defendant's *motion to dismiss* or for summary judgment on the ground of qualified immunity easily meets [the *Cohen*] requirements.") (emphasis added); *Schrob v. Catterson*, 948 F.2d 1402, 1406-07 (3d Cir.1991).[8] The Court has made it clear that because the entitlement at issue is "an *immunity from suit* rather than a mere defense to liability," claims of qualified immunity should be resolved at the earliest possible stage of the proceedings. *Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2815 (emphasis in original) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 817, 102 S.Ct. 2727, 2737-38, 73 L.Ed.2d 396 (1982)). A requirement that official defendants answer wholly meritless claims for relief or adduce facts to refute entirely unsubstantiated allegations would run counter to the Court's express direction. We conclude that we have jurisdiction to consider Behrens's appeal.

We do not, however, hold that an official defendant claiming qualified immunity may take advantage of the several *opportunities* for immediate appeal afforded him by

---

[8] *Cf. Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (9th Cir.1991) (allowing interlocutory appeal from denial of motion to dismiss based on the *Feres* doctrine); *Marx v. Government of Guam*, 866 F.2d 294, 296 (9th Cir.1989) (allowing interlocutory appeal from denial of motion to dismiss based on sovereign immunity); *Schlegel v. Bebout*, 841 F.2d 937, 941 (9th Cir.1988) (allowing interlocutory appeal from denial of motion to dismiss based on absolute immunity).

bringing repeated pretrial appeals. Pelletier's contention that a rule allowing interlocutory appeals from denials of motions to dismiss, as well as from denials of summary judgment, will encourage official defendants in civil rights cases to use such appeals as delaying tactics is not an idle one. As we have previously observed, "government defendants apparently now deem it mandatory to bring these appeals from any adverse ruling, no matter how clearly correct the trial court's decisions." *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1210 (9th Cir.1988); *see also Manhattan Beach Police Officers Ass'n v. City of Manhattan Beach*, 881 F.2d 816, 817 (9th Cir.1989). If appeals from denials of qualified immunity are also to become routine at the motion to dismiss stage, the burden on civil rights plaintiffs, in terms of both delay and expense, could be considerable.

More important, the practice of filing routine appeals from denials of pretrial motions for qualified immunity, even in cases in which the district court was clearly correct, evinces a flagrant disregard of the Court's intent in creating the qualified immunity doctrine. The doctrine was created in order to protect good faith exercises of official discretion, not to shield willful or knowing lawless action taken under color of official authority. *Butz v. Economou*, 438 U.S. 478, 505-07, 98 S.Ct. 2894, 2910-11, 57 L.Ed.2d 895 (1978). It was intended to permit "[i]nsubstantial lawsuits [to] be quickly terminated," *id.* at 507, 98 S.Ct. at 2911, not to deter legitimate lawsuits from proceeding. The Court has repeatedly and emphatically refused to accord absolute immunity to government officials accused of constitutional transgressions. *Id.* at 505-06, 98 S.Ct. at 2910-11; *Scheuer v. Rhodes*, 416 U.S. 232, 237, 248-49, 94 S.Ct. 1683, 1686, 1692-93, 40 L.Ed.2d 90 (1974).

[2] For the same reasons that an official defendant may not use the immediate appeal that the law allows him to convince the court to resolve disputed factual issues in his

favor, *see, e.g., Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir.1987), he also may not demand repeated appellate consideration of a claim of qualified immunity that the district court has repeatedly rejected. One such interlocutory appeal is all that a government official is entitled to and all that we will entertain. We do not think that a rule limiting defendants to one bite at the apple will be "peculiarly disruptive of effective government." *Harlow v. Fitzgerald*, 457 U.S. 800, 817, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Under *Mitchell*, an official defendant claiming qualified immunity is entitled to immediate appellate consideration of a limited issue only. That issue is the narrow and "purely legal" one of "whether the facts alleged . . . support a claim of violation of clearly established law." 472 U.S. at 528 n. 9, 105 S.Ct. at 2816 n. 9. If the defendant's entitlement to qualified immunity is truly ascertainable as a matter of law without a need for full discovery or trial, determination of that fact should not require more than one judiciously timed appeal. As we discuss below, on appeal from a denial of a motion to dismiss we, like the district court, are required to view the nonmoving party's allegations in a generous light. If the district court determines that the defendant's entitlement to qualified immunity is not established at the motion to dismiss stage, he appeals at his peril. He may appeal immediately or he may answer the complaint and defer pursuit of his qualified immunity claim, and of appellate review of any denial of that claim, until it appears that a motion for summary judgment would be appropriate, Behrens has chosen the former route. We affirm his right to make that choice.

B

Behrens asserts that the comprehensive federal regulation of the savings and loan industry constitutes a "special factor" counseling against judicial creation of a *Bivens*

remedy for the wrongs allegedly suffered by Pelletier. *Schweiker v. Chilicky*, 487 U.S. 412, 423, 108 S.Ct. 2460, 2467, 101 L.Ed.2d 370 (1988) ("When the design of a governmental program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies."); *see also Saul v. United States*, 928 F.2d 829, 835-40 (9th Cir.1991). While this argument may merit consideration by the district court at a later stage in the proceedings, it is outside the limited scope of this interlocutory appeal. On review of a denial of qualified immunity, "[w]e have jurisdiction only to decide if defendant's conduct violated . . . clearly established constitutional rights." *Todd v. United States*, 849 F.2d 365, 368 (9th Cir.1998). The question whether a judicially created *remedy* is available for that conduct is not properly before us. Accordingly, we decline to address Behrens's preemption argument.

C

[3] We now proceed to consider whether, as Behrens maintains, Pelletier has failed to allege facts sufficient to support his claims that Behrens's conduct violated his clearly established constitutional rights. Because the district court elected to treat Behrens's motion for qualified immunity primarily as a motion to dismiss Pelletier's complaint for failure to state a claim, we will treat Behrens's appeal in like fashion.[9] We agree with the district court that Pelletier's pleadings are sufficiently specific.

---

[9]The court declined to rule on Behrens's alternative motion for summary judgment on the ground that that motion was premature. It is not clear that Behrens has appealed that aspect of the district court's ruling. Moreover, his briefs fail to discuss the question of prematurity. In any event, the decision was well within the district court's discretion, and we will not disturb it.

As an initial matter Behrens argues that no constitutionally protected liberty or property interest in private employment exists where that employment is contingent on regulatory approval. Behrens relies on the Fifth Circuit's decision in *Connelly v. Comptroller of the Currency*, 876 F.2d 1209, 1213 (5th Cir.1989). We have not yet had occasion to consider whether a requirement of regulatory approval suffices to negate entirely the constitutional protection to which a privately employed individual would otherwise be entitled. Moreover, we need not do so here. In light of the district courts partial dismissal of Pelletier's *Bivens* claims as barred by the statute of limitations, the question whether Pelletier had a cognizable liberty or property interest in the particular position that he held at Pioneer is not before us.

[4] The district court preserved Pelletier's *Bivens* claims only to the extent that those claims allege continuing efforts by Behrens to prevent Pelletier from securing employment in the savings and loan industry.[10] We have recognized that ongoing interference with an individual's pursuit of his chosen livelihood may amount to deprivation of a constitutionally protected liberty interest in employment:

> An individual has a liberty interest in employment protected by the Due Process Clause if the dismissal is "for reasons that might seriously damage his standing in the community," *Bollow v. Federal Reserve Bank*, 650 F.2d 1093, 1100 (9th Cir.1981), *cert. denied*, 455 U.S. 948, 102 S.Ct. 1449, 71 L.Ed.2d 662 (1982), or if the dismissal effectively precludes future work in the individual's chosen profession, *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959).

---

[10]Most executive level appointments in that industry do not require prior regulatory approval. Thus, the *Connelly* issue is not relevant here.

Merritt v. Mackey, 827 F.2d 1368, 1373 (9th Cir.1987). It is with respect to this clearly established right that we must examine the allegations contained in Pelletier's complaint.

[5] In order to survive a motion for *summary judgment*, the nonmoving party ordinarily must furnish affidavits containing admissible evidence tending to show the existence of a genuine dispute of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). In *DiMartini v. Ferrin*, 889 F.2d 922 (9th Cir.1989), *amended on other grounds*, 906 F.2d 465 (9th Cir.1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 2796, 115 L.Ed.2d 970 (1991), we considered this requirement as applied to a motion for summary judgment based on qualified immunity. We concluded that because the pendency of such a motion stays discovery by the plaintiff, the requirement of admissibility is somewhat relaxed and "greater tolerance of speculation and inference must be afforded." *Id.* at 927. Accordingly, affidavits submitted by the plaintiff that contain hearsay or other inadmissible evidence will suffice to preclude summary judgment if those affidavits are otherwise sufficient to defeat a claim of entitlement to qualified immunity. *Id.*

Behrens argues that Pelletier's charges of concerted action amount to no more than "vague assumptions about informal communications within an industry" and therefore fall outside the scope of the protection afforded by *DiMartini*. *Id.* We agree with Behrens that Pelletier's complaint raises at most nebulous theories of conspiracy, and that those theories in their current form would be insufficient to survive a motion for summary judgment even under *DiMartini*. However, as we have previously discussed, this case does not come before us following denial of a motion for summary judgment. Rather, Behrens appeals the district court's denial of his motion to dismiss Pelletier's *Bivens* claims.

[6-8] On a motion to dismiss, the court must accept the complaint's allegations as true in their entirety, *Williford v. California*, 352 F.2d 474, 475-76 (9th Cir.1965), and must draw all reasonable inferences in favor of the nonmoving party, *United States v. City of Redwood*, 640 F.2d 963, 966 (9th Cir.1981). There is no requirement that the nonmoving party supplement his pleadings with affidavits in order to survive a motion to dismiss.[11] If, liberally construed, Pelletier's complaint contains even one allegation of a harmful act that would constitute a violation of a clearly established constitutional right, Pelletier is entitled to go forward with his *Bivens* claims against Behrens. *Cf. McCalden v. California Library Ass'n*, 955 F.2d 1214, 1221 (9th Cir.1992).

Upon examination of Pelletier's complaint, we conclude that it meets this minimal standard. Pelletier alleges that "[s]everal senior level jobs have been tentatively offered to him only to be withdrawn after learning of [Behrens's letter] and its impact upon Pelletier's employment at Pioneer" and that he remains "unable to secure other employment in the savings and loan and the financial institutions industries." Taken to be true, as they must for purposes of this appeal, those allegations, read in light of the more general allegations of the complaint, are sufficient to support the claim that Behrens violated Pelletier's clearly established right to pursue his chosen profession free from interference by the government.[12] *Merritt*, 827 F.2d at 1371. The

---

[11]To the contrary, our review of the district court's ruling on a motion to dismiss is limited to the contents of the complaint. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir.1989).

[12]The complaint makes the following general allegations regarding Behrens and the other defendants:

> 25. Pelletier is informed and believes and on that basis alleges that Defendants, and each of them, have made and continue to make a concerted effort to prevent Pelletier from securing employment in the financial institutions industry.

general allegations that the defendants, including Behrens, engaged in concerted action aimed at preventing Pelletier from securing employment in the savings and loan industry and at destroying his reputation support the inference that a cause and effect relationship existed between conduct on Behrens's part and the withdrawal of particular job offers. Accordingly, the district court's denial of Behrens's motion to dismiss Pelletier's *Bivens* claims was proper.[13]

III

Behrens contends that under the FELRTCA the district court was required to substitute the United States in his place as defendant with respect to Pelletier's common law tort claims. Again, Pelletier argues that the denial of substitution is not an appealable order. We disagree. An order denying substitution under the FELRTCA is precisely the type of order for which interlocutory review is contemplated under the *Cohen* collateral order doctrine. On the merits of the substitution issue, we conclude that the district court erroneously applied a "scope of authority" test to determine

---

26. Pelletier is informed and believes and on that basis alleges that the Defendants have acted in concert with each other, and with others, and have prevented and continue to prevent him from securing any gainful employment in the savings and loan and related financial institutions industries.

27. Defendants' actions have created, and continue to create, a false and damaging impression about Pelletier in the savings and loan industry with respect to Pelletier's abilities, his performance and his honesty.

[13]In his brief, Pelletier argues that Behrens is a private party, and therefore not eligible for qualified immunity from liability in any event. However, Pelletier later concedes that Behrens was an agent of the FHLBB and FSLIC. We think it is clear that when a duly designated Supervisory Agent for the FHLBB and FSLIC discharges duties for those agencies, he is acting as a federal employee. *Saratoga Savings & Loan Ass'n v. Federal Home Loan Bank of San Francisco*, 724 F.Supp. 683, 685 (N.D.Cal.1989).

Behrens's eligibility for substitution rather than the broader "scope of employment" test required by the FELRTCA, and that under the correct analysis it is clear as a matter of law that Behrens was acting within the scope of his employment with respect to Pelletier. We therefore reverse the district court's denial of substitution.

A

[9] To constitute an appealable "final decision" under 28 U.S.C. § 1291, an order "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1948)). We join the Fifth Circuit in holding that a district court order denying substitution of the United States as defendant under the FELRTCA satisfies this standard. *Mitchell v. Carlson*, 896 F.2d 128, 133 (5th Cir.1990).[14]

As the Fifth Circuit recognized, the substitution provision of the FELRTCA constitutes a congressional grant of immunity *from suit* to eligible federal employees. *Id.; see also* H.R.Rep. No. 700, 100th Cong., 2d Sess. 2-4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5945-47 (the FELRTCA is intended to provide federal employees with

---

[14]It appears that the Second Circuit would also reach this conclusion. *Yalkut v. Gemignani*, 873 F.2d 31, 34 (2d Cir.1989). The FELRTCA was enacted during the pendency of the *Yalkut* defendants' interlocutory appeal from the district court's denial of their motion for summary judgment based on absolute official immunity. *Id* at 34. Although *Yalkut* did not involve a motion for substitution under the FELRTCA, the Second Circuit applied the provisions of the FELRTCA retroactively in evaluating the defendants' entitlement to immunity. *Id.*

absolute immunity from suit for common law torts committed within the scope of their employment). A denial of substitution is thus analogous to a denial of qualified immunity. In both cases, the entitlement at issue is "like an absolute immunity [in that] it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. at 526, 105 S.Ct. at 2815. Thus, the third prong of the *Cohen* test is met. Congress's clearly expressed intent to create an entitlement to immunity from suit virtually dictates the conclusion that a denial of substitution under the FELRTCA constitutes an appealable "final" order.

A denial of substitution under the FELRTCA also satisfies the first two prongs of the *Cohen* test. To issue such an order, the district court must review the certification issued by the Attorney General in light of specific documentary proof provided by the parties. *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 745 (9th Cir.1991). The order thus operates as a conclusive determination of the scope of employment issue. In addition, the scope of employment inquiry is entirely separable from the question whether liability in tort does or does not attach for the challenged conduct.

Pelletier argues that a denial of substittion is not immediately appealable because the scope of employment inquiry does not present a pure question of law but rather a mixed question of law and fact. *Meridian*, 939 F.2d at 745. *Cohen*, however, imposes no such requirement. As discussed above, under *Cohen* the issue appealed need only be separable from the merits of the underlying action. The rule established in *Mitchell vs. Forsyth*, 472 U.S. at 528 & n. 9, 105 S.Ct. at 2816 n. 9, that a denial of qualified immunity is immediately appealable only to the extent that the appeal presents a question of law, reflects the fact that the order appealed from in *Mitchell* was a denial of *summary judgment*. Put differently, *Mitchell* simply stands for the proposition that a

party appealing the denial of qualified immunity may not take advantage of the *Cohen* collateral order doctrine to circumvent the rules that govern summary judgment motions generally.

[10, 11] We note that the case before us presents a question of law — namely, whether the district court applied the proper test to determine whether Behrens was eligible for substitution — and that there do not appear to be any factual disputes regarding the scope of Behrens's *employment. See infra* Part III(B).[15] However, we also note that in ruling on a motion for substitution under the FELRTCA, the district court is authorized to hold an evidentiary hearing and resolve disputed questions of fact. *Meridian*, 939 F.2d at 745. An order granting or denying substitution is, in essence, a determination of subject matter jurisdiction to sue the United States under the Federal Tort Claims Act. 28 U.S.C. §§ 1346(b), 2674. When ruling on a challenge to subject matter jurisdiction, a district court ordinarily may hear evidence and resolve factual disputes relating to jurisdiction prior to trial. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983) (citing *Thornhill Publishing Co. v. General Tel. Corp.*, 594 F.2d 730, 733 (9th Cir.1979)). The questions of whether and when a district court may decline to rule on a motion for substitution prior to trial are not before us, and we will not address them here.

In short, a denial of substitution under the FELRTCA falls squarely within the class of immediately appealable orders defined by the *Cohen* collateral order doctrine. Accordingly, we proceed to consider the merits of Behrens's appeal.

---

[15]As we demonstrate in Part III(B), the factual dispute that exists between the parties regarding the scope of Behrens's *authority* is irrelevant.

B

[12, 13] The FELRTCA provides that "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose . . . the United States shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(1). A scope of employment certification issued by the Attorney General is subject to *de novo* review by the district court. *Meridian*, 939 F.2d at 745. In such a case, we review the district court's scope of employment determination *de novo*. *Id.*

The district court based its conclusion that Behrens was not acting within the scope of his employment as a Supervisory Agent of the FHLBB on the language of the FHLBB regulations then in force. The court found that under the FHLBB regulations governing supervisory agents, neither Behrens nor his Principal Supervisory Agent, James Cirona, had the authority to order that Pelletier be removed from his position as managing officer of Pioneer. 12 C.F.R. § 501.11 (1989), *repealed by* 54 Fed.Reg. 49,420 (1989).[16] In addi-

---

[16]The regulation authorized the Principal Supervisory Agent and any duly designated Supervisory Agents to act in a purely advisory capacity to the FHLBB:

> (c) He shall confer and negotiate, pursuant to instructions from the Board and the Federal Savings and Loan Insurance Corporation . . . with applicants and with officers, directors, members, or creditors of applicant institutions . . . .
>
> (d) He shall see that Federal savings and loan associations and other insured institutions in his bank district submit to him for his consideration such matters . . . as are required to be acted upon by the Board or the Federal Savings and Loan Insurance Corporation by statute, rule, or regulation. When these matters come to the attention of said agent he shall, after giving them due consideration, submit them, together with such supplemental information as may be available to him, to the Board with his recommendations thereon.
>
> . . . . .

tion, the court found no evidence that the FHLB had delegated that authority to Behrens or to Cirona by any other means. Because removal of Pelletier from his position 'was not within the scope of Behrens's *authority* as defined by regulation, the court concluded that Behrens was not acting within the scope of his *employment*. That conclusion confuses the narrow sense in which "scope of employment" was understood for purposes of pre-FELRTCA doctrines of official immunity with the broader sense in which that term is used in the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, of which the FELRTCA is a part.

Before the enactment of the FELRTCA established a statutory right to substitution, federal employees who were sued in tort for injuries arising out of conduct within the scope of their employment could attempt to assert the common law defense of official immunity. That defense shielded only conduct "within the outer perimeter" of the official's designated duties. *Barr v. Matteo*, 360 U.S. 564, 575, 79 S.Ct. 1335, 1341, 3 L.Ed.2d 1434 (1959) (plurality opinion). Conduct outside the scope of an official's authority, as defined by statute, regulation, or established practice, was unprotected. *Id.* at 572, 79 S.Ct. at 1340 (" 'The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers . . . . ' ") (quoting *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir.1949)).

In *Westfall v. Erwin*, 484 U.S. 292, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988), the Court substantially narrowed the scope of the official immunity defense, holding that federal employees could not assert immunity from liability for

---

(g) Such agent shall forward promptly to the Board copies of all transmittal and other supervisory letters . . . . The Board will consider the documents so forwarded and advise the said agent concerning such matters as may appear to be appropriate.

Id.

common law torts unless the conduct at issue was discretionary in nature. *Id.* at 297-98, 108 S.Ct. at 584-85. In order to restore immunity to federal employees who perform nondiscretionary functions, Congress enacted the FELRTCA, popularly known as the Westfall Act. H.R.Rep. No. 700, 100th Cong., 2d Sess. 3-4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5946-47. The FELRTCA amended the FTCA to "remove the potential personal liability of Federal employees for common law torts committed within the scope of their employment, and . . . instead provide that the exclusive remedy for such torts is through an action against the United States under the Federal Tort Claims Act." *Id.* at 4, *reprinted in* 1988 U.S.C.C.A.N. 5945, 5947.

Under the FTCA, an individual who has suffered an injury cognizable in tort as a result of the conduct of a federal employee may bring suit against the United States if that employee was "acting within the scope of his office or employment." *Id.* § 1346(b), 2674. The question whether a federal employee whose allegedly tortious conduct is the subject of a lawsuit under the FTCA was "acting within the scope of his office or employment" at the time of the injury is to be answered according to the principles of *respondeat superior* of the state in which the alleged tort occurred. *Proietti v. Civiletti*, 603 F.2d 88, 90 (9th Cir.1979) (citing *Williams v. United States*, 350 U.S. 857, 76 S.Ct. 100, 100 L.Ed. 761 (1955) (per curiam)); *see also Nasuti v. Scannell*, 906 F.2d 802, 805 n. 3 (1st Cir. 1990).

[14] The FELRTCA accords a right of substitution to any federal employee sued in tort who was "acting within the scope of his office or employment" when the allegedly tortious conduct occurred. 28 U.S.C. § 2679(d)(1). Logic and common sense dictate that the phrase "acting within the scope of his office or employment" be given the same meaning for purposes of the substitution provision of the

FELRTCA as it is for purposes of the FTCA generally, and every other circuit to consider the issue has so held. *Sullivan v. Freeman*, 944 F.2d 334, 336 (7th Cir.1991); *Johnson v. Carter*, 939 F.2d 180, 183 (4th Cir.), *vacated and reh'g en banc granted* (4th Cir. Oct. 9, 1991); *Arbour v. Jenkins*, 903 F.2d 416, 421-22 (6th Cir.1990); *Yalkut v. Gemignani*, 873 F.2d 31, 34 (2d Cir.1989). In addition, the legislative history of the FELRTCA clearly establishes that Congress intended the principles of *respondeat superior* that govern FTCA actions to control decisions regarding entitlement to substitution. H.R.Rep. No. 700, 100th Cong., 2d Sess. 5-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949. We conclude that the question of Behrens's entitlement to substitution is controlled by California principles of *respondeat superior*. It is to those principles that we now turn.

Under California law, the determinative factor in establishing vicarious liability under the doctrine of *respondeat superior* is not whether the employee's act was authorized, but whether the act was committed in the course of carrying out the employer's business. *Perez v. Van Groningen & Sons, Inc.*, 41 Cal.3d 962, 227 Cal.Rptr. 106, 109, 719 P.2d 676, 679 (1986). Vicarious liability thus may attach for unauthorized, or even prohibited, conduct, if the risk of that conduct is " 'one "that may fairly be regarded as typical of or broadly incidental" to the enterprise undertaken by the employer.' " *Id.*, 227 Cal.Rptr. at 108, 719 P.2d at 678 (quoting *Rodgers v. Kemper Constr. Co.*, 50 Cal.App.3d 608, 619, 124 Cal.Rptr. 143 (1975) (citations omitted)); *see also Liu v. Republic of China*, 892 F.2d 1419, 1427 (9th Cir.1989) ("California follows the 'enterprise theory' of liability."), *cert. dismissed*, ____ U.S. ____, 111 S.Ct. 27, 111 L.Ed.2d 840 (1990); *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1025-26 (9th Cir.1987), *cert. denied*, 485 U.S 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (1988). By contrast, vicarious liability does not attach if the employee "has substantially deviated from his duties for personal

purposes." *Perez*, 719 P.2d at 679 (quoting *Hinman v. Westinghouse Elec. Co.*, 2 Cal.3d 956, 88 Cal.Rptr. 188, 471 P.2d 988, 990 (1970)).

Applying the rule set forth in *Perez* to the facts of the case before us, we think it is clear that, as a matter of law, Behrens was acting within the scope of his employment when he wrote the letter requesting Pelletier's resignation. Although Behrens was not authorized to remove Pelletier from his position as managing officer, his decision to ask Pioneer to do so did not constitute a deviation from his duties for personal purposes. Rather, Behrens wrote the letter to further his employer's "business" — namely, that of ensuring that the management of newly chartered federal savings and loan institutions was entrusted to competent, reliable, and trustworthy individuals. Taking the allegations in Pelletier's complaint to be true, *see supra* Part II(C), it is equally clear that, notwithstanding the absence of any similar requirement for regulatory approval with respect to most executive level positions in the savings and loan industry, any subsequent communications that Behrens may have had with potential employers regarding Pelletier's qualifications were also within the scope of Behrens's employment. The "business" of the FHLBB is the supervision of the savings and loan industry to ensure regulatory compliance, and the character and conduct of industry executives are matters within its legitimate concern regardless of whether or not the employment was initially contingent on the FHLBB's approval. Our conclusion holds even if subsequent communications were made with the intent to cause Pelletier distress. Under California law, vicarious liability attaches for intentional torts committed by an employee so long as the employee was motivated in part by an intent to serve the employer. *Perez*, 719 P.2d at 680; *accord Liu*, 892 F.2d at 1428-29. Accordingly, we conclude that Behrens is entitled to substitution.

CONCLUSION

For the reasons stated above, we hold that we have jurisdiction to consider both questions raised by Behrens on appeal. We also hold that the district court correctly denied Behrens's motion to dismiss Pelletier's *Bivens* claims on the ground of qualified immunity, but that its refusal to substitute the United States as defendant in Behrens's place as to Pelletier's common law tort claims was error. Pelletier's request for attorneys' fees on appeal is denied.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.